Supreme Court, U. S.
FILED
NOV 19 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1975

No. 74-1656

JOHN C. MOE, et al,

Appellants,

v.

THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, et al,

Appellees.

THE STATE OF MONTANA, et al,

Appellants,

v.

THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, et al,

Appellees.

No. 75-50

THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, et al,

Appellants,

v.

JOHN C. MOE, et al,

Appellees.

On Appeal from the United States District Court For the District of Montana

---

BRIEF FOR THE APPELLANTS

Robert L. Woodahl
Attorney General for the State of Montana
State Capitol Building
Helena, Montana 59601

Sam E. Haddon
Special Assistant Attorney General
First National Bank Building
Missoula, Montana 59801

Jean A. Turnage
Special Assistant Attorney General
P.O. Box 450
Polson, Montana 59860

Attorneys for Appellants

INDEX

Page

Table of Authorities iii

Opinions Below 2

Jurisdiction 2

Constitutional Provisions, Treaty and Statutes Involved 3

Questions Presented 3

Statement of the Case 4

Summary of Argument 7

Argument

1. The immunity from state taxation granted to Indians on the Flathead Reservation is an unlawful and unconstitutional racial discrimination in favor of Indians and against non-Indian citizens contrary to the fundamental principles of equal protection and due process embodied in the Fifth and Fourteenth Amendments to the Constitution of the United States. 8

2. The immunity from state taxation granted to Indians on the Flathead Reservation is contrary to the provisions of the General Allotment Act, 24 Stat. 390, 25 U.S.C. § 349, and related legislation. 14

3. The district Court erred in holding it had jurisdiction to enjoin enforcement of tax laws of the State of Montana notwithstanding the prohibition against such injunction in 28 U.S.C. § 1341. 19

4. The State of Montana has jurisdiction over individual Indian citizens who are members of the Confederated Salish and Kootenai Tribes residing on the Flathead Reservation to require precollection of state cigarette taxes on sales of cigarettes to non-Indians. 23

Conclusion 25

Certificate of Mailing 26

TABLE OF AUTHORITIES

CASES: **Page**

Agua Caliente Band of Mission Ind. v. County of Riverside, 442 F.2d 1184 (9th Cir. 1971) cert. denied 405 U.S. 933 (1972) 20

Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522 (1959) 11

American Commuters Association, Inc. v. Levitt, 405 F.2d 1148 (2nd Cir. 1969) 21

Barrows v. Jackson, 346 U.S. 249 (1952) 12

Bland v. McHann, 463 F.2d 21 (5th Cir. 1972) 21, 22

Boling v. Sharpe, 347 U.S. 497 (1954) 10, 11

Boyd v. Nebraska, 143 U.S. 135 (1892) 10

Brown v. Board of Education, 349 U.S. 294 (1954) 13

Bulluck v. Washington, 468 F.2d 1096 (D.C. Cir. 1972) 11

Bussie v. Long, 383 F.2d 766 (5th Cir. 1967) 19

Choctau Nation v. United States, 318 U.S. 423 (1943) 17

Confederated Tribes v. Namen, 380 F.Supp. 349 (D. Mont. 1974) 14, 16

DeFunias v. Odegaard, 416 U.S. 312 (1974) 12, 13

Department of Employment v. United States, 385 U.S. 355 (1966) 19

Dickson v. Luck Land Co., 242 U.S. 371 (1917) 14

Federal Compress & Warehouse Co. v. McLean, 291 U.S. 17 (1934) 21

Frontiero v. Richardson, 411 U.S. 677 (1973) 10, 11

Gloss v. Board of Education, 373 U.S. 683 (1963) 13

Goudy v. Meath, 203 U.S. 146 (1906) 15, 16

Kills Crow v. United States, 451 F.2d 323 (8th Cir. 1971) cert. den. 405 U.S. 999 (1972) 9, 10
Loving v. Virginia, 388 U.S. 1 (1967) 9, 10, 11, 13
Martin v. Mancari, 417 U.S. 535 (1974) 13
Mattz v. Arnett, 412 U.S. 481 (1973) 16
McClanahan v. State Tax Comm'n of Arizona, 411 U.S. 164 (1973) 12, 13, 20, 24
Mescalaro Apache Tribe v. Jones, 411 U.S. 145 (1973) 13, 17, 20, 21
Non-Resident Taxpayer Ass'n v. Municipality of Philadelphia, 478 F.2d 456 (3rd Cir. 1973) 19
Oklahoma Tax Comm'n v. United States, 319 U.S. 598 (1943) 12, 17
Seymour v. Superintendent, 368 U.S. 351 (1962) 16
Shelley v. Kraemer, 334 U.S. 1 (1948) 12
Stevens v. C.I.R., 452 F.2d 741 (9th Cir. 1971) 16
The Confederated Salish and Kootenai Tribes v. Moe, 392 F.Supp. 1297 (D. Mont. 1975) 2, 11, 13, 20
The Confederated Salish and Kootenai Tribes v. State of Montana, 392 F.Supp. 1325 (D. Mont. 1975) 2
United States v. Arlington County, Commonwealth of Virginia, 326 F.2d 929 (4th Cir. 1964) 19
United States v. Klamath and Moadoc Tribes, 304 U.S. 119 (1938) 10
United States v. Rogers, 45 U.S. (4 How.) 567 (1846) 9
Walters v. City of St. Louis, 347 U.S. 231 (1954) 11
Warren Trading Post v. Arizona Tax Comm'n, 380 U.S. 685 (1965) 12, 23
Williams v. Lee, 358 U.S. 217 (1959) 24
Worchester v. Georgia, 31 U.S. (6 Pet.) 515 (1832) 13

CONSTITUTIONAL PROVISIONS: **Page**

Article I, Sec. 8, Clause 3, United States Constitution 3, 10
Fifth Amendment, United States Constitution ... 3, 7, 8, 11
Fourteenth Amendment, United States Constitution 3, 8, 9, 10, 11
Fifteenth Amendment, United States Constitution 3, 10

TREATY: **Page**

Treaty of Hell Gate, 12 Stat. 975 ..... 3, 4, 9

UNITED STATES STATUTES: **Page**

Act of April 23, 1904, 33 Stat. 302 ..... 4, 14
Act of June 2, 1924, 43 Stat. 253 ..... 3, 10
Civil Rights Act of 1870, 42 U.S.C. 1981 6
General Allotment Act, 25 U.S.C. § 349, 24 Stat. 390 ..... 3, 7, 8, 14, 15, 16, 17
Indian Reorganization Act of 1934, 48 Stat. 984 ..... 15, 16
25 U.S.C. 181 9
25 U.S.C. 182 9
25 U.S.C. 184 9
28 U.S.C. 1253 2
28 U.S.C. 1341 ..... 3, 4, 8, 19, 21, 23
28 U.S.C. 1343 ..... 8, 19, 21, 22
42 U.S.C. 1981 16
42 U.S.C. 1983 ..... 19, 21, 22

MONTANA STATUTES: **Page**

R.C.M. 1947, Sec. 53-114 ..... 3, 7
R.C.M. 1947, Sec. 53-119 7
R.C.M. 1947, Sec. 53-1025 to -1029 3
R.C.M. 1947, Sec. 84-201 3

R.C.M. 1947, Sec. 84-301 3
R.C.M. 1947, Sec. 84-404 3
R.C.M. 1947, Sec. 84-406 3
R.C.M. 1947, Sec. 84-409 and -410 3
R.C.M. 1947, Sec. 84-601 to -607 19
R.C.M. 1947, Sec. 84-708, -709 and -709.1 19
R.C.M. 1947, Sec. 84-4201 and -4202 3
R.C.M. 1947, Sec. 84-4502 19
R.C.M. 1947, Sec. 84-4505 19
R.C.M. 1947, Sec. 84-5606 to -5606.31 ..... 3, 23, 24

IN THE

Supreme Court of the United States

October Term, 1975

No. 74-1656

JOHN C. MOE, et al,

Appellants,

v.

THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, et al,

Appellees.

THE STATE OF MONTANA, et al,

Appellants,

v.

THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, et al,

Appellees.

No. 75-50

THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, et al,

Appellants,

v.

JOHN C. MOE, et al,

Appellees.

On Appeal from the United States District Court For the District of Montana

---

OPINIONS BELOW

The opinions of the District Court are reported in part. Three opinions were issued in the cigarette tax case (Civil No. 2145) on October 10, 1973, May 10, 1974 and February 4, 1975 respectively. The opinions of May 10, 1974 and February 4, 1975 are reported in *The Confederated Salish and Kootenai Tribes v. Moe,* 392 F.Supp. 1297 (D. Mont. 1975). All three opinions are set forth in the Appendix to Appellants' Jurisdictional Statement[1] (App. pp. 73-86, 37-71 and 11-35)[2]. The final order and opinion in the companion property tax case (Civil No. 74-40-M) issued on March 19, 1975 is reported in *The Confederated Salish and Kootenai Tribes v. State of Montana,* 392 F.Supp. 1325 (D. Mont. 1975), and is set forth in the Appendix to Appellants' Jurisdictional Statement (App. pp. 3-10). A separate memorandum of March 19, 1975 in the property tax case is reproduced in the Appendix to Appellees' Jurisdictional Statement on Cross Appeal (App. pp. 1A-2A).

JURISDICTION

Final judgments of the three-judge district court, by divided vote, were entered March 19, 1975. Notices of appeal were filed on May 6, 1975 in No. 74-1656 and on May 16, 1975 in No. 75-50. On October 6, 1975, this Court noted probable jurisdiction and consolidated the appeal in No. 74-1656 with the cross appeal in No. 75-50. The jurisdiction of this Court rests upon 28 U.S.C. § 1253.

[1]References to the Appendix to Appellants' Jurisdictional Statement are abbreviated herein as "App.".

[2]Leave to dispense with an Appendix to the briefs under Rule 36 was granted by Order of the Court dated November 3, 1975.

CONSTITUTIONAL PROVISIONS, TREATY AND STATUTES INVOLVED

The constitutional provisions, treaty and statutes involved in this case are: Fifth Amendment to the Constitution of the United States; Fourteenth Amendment to the Constitution of the United States; Fifteenth Amendment to the Constitution of the United States; Article I, Sec. 8, Clause 3 of the Constitution of the United States; Treaty of Hell Gate, 12 Stat. 975; The General Allotment Act, 25 U.S.C. § 349, 24 Stat. 390; Act of June 2, 1924, 43 Stat. 253; 28 U.S.C. § 1341; R.C.M. 1947, §§ 53-114, 53-1025 to -1029, 84-201, 84-301, 84-404, 84-406, 84-409 and -410; 84-4201 and -4202; and 84-5606 to -5606.31. The texts of these constitutional provisions, treaty and statutes are reprinted in the Appendix to Appellants' Jurisdictional Statement (App. pp. 115 ff).

QUESTIONS PRESENTED

The questions presented by the consolidated appeals are:[3]

1. Whether the immunity from state taxation granted to Indians on the Flathead Reservation is an unlawful and unconstitutional racial discrimination in favor of Indians and against non-Indian citizens contrary to the fundamental principles of equal protection and due process embodied in the Fifth and Fourteenth Amendments to the Constitution of the United States.

2. Whether the immunity from state taxation granted to Indians on the Flathead Reservation is contrary to the provisions of the General Allotment Act, 24 Stat. 390, 25 U.S.C. § 349, and related legislation.

[3]Issues 1, 2 and 3 are presented by the appeal of the State of Montana in No. 74-1656. Issue 4 is raised in the cross appeal of the Confederated Tribes in No. 75-50.

3. Whether the District Court erred in holding it had jurisdiction to enjoin enforcement of tax laws of the State of Montana notwithstanding the prohibition against such injunction in 28 U.S.C. § 1341.

4. Whether the State of Montana had jurisdiction over members of the Confederated Salish and Kootenai Tribes residing on the Flathead Reservation to force them to precollect state cigarette taxes on sales to non-Indians.

STATEMENT OF THE CASE

The Flathead Reservation, created by the Treaty of Hell Gate in 1855 (12 Stat. 975) consists of approximately 1,245,000 acres located in northwestern Montana. (App. pp. 12-13) In 1904 Congress provided for allotments in severalty to members of the Tribes "under the provisions of the allotment laws of the United States." Act of April 23, 1904, 33 Stat. 302. Surplus unallotted lands within the Reservation were surveyed and appraised and opened for settlement under the homestead laws. As a result, over 404,000 acres were sold to non-Indians. A portion of the lands allotted to individual Indians passed into non-Indian ownerships (App. p. 23) while some Indian patentees still reside on the Reservation. (App. p. 19) The State of Montana received over 60,000 acres for school purposes. Additional acreages were passed to churches and schools and others. At present approximately 628,642 acres are owned in fee and 614,311 acres are held in trust either for the Tribes or for individual Indians. (App. p. 13) The Reservation lies in parts of four Montana counties — Lake, Sanders, Missoula and Flathead. (App. p. 13)

As a result of congressional action, the Flathead Irrigation Project was created on the Reservation. Irrigation districts were established under state law and through use of the state courts of the State of Montana to operate and maintain the project and to repay the United States for construction costs of the project. An elaborate irrigation

system has been built and extensive domestic power projects established to provide power for pumping and domestic and commercial use on Indian and non-Indian lands on the Reservation. (App. p. 23)

The Reservation is a well developed agricultural area with farms, ranches and communities located throughout the inhabited portions of the Reservation. Indians and non-Indians are randomly scattered over the whole of the occupied portions of the Reservation and live together in integrated communities. Banks, businesses and professions on the Reservation provide services to Indians and non-Indians alike. (App. p. 13)

Only about 19 per cent of the total Reservation population of approximately 17,826 is Indian. Enrolled members in the Tribes number approximately 5,749. Less than 3,000 members reside on the Reservation. Over 2,000 live outside the State of Montana. Over 4,000 of the tribal members have less than one-half Indian blood. Only 166 individuals are classified as full blood Indians. An almost equal number, 159, are less than one-sixteenth Indian blood. (App. p. 13) In many families residing on the Reservation only one of the parents is a member of the Tribes and only a part of the children are tribal members or are eligible for tribal membership. (Plaintiffs' Response to Request for Admission of Facts, No. 13, September 13, 1974)

As Montana citizens members of the Tribes are eligible to vote and do vote in city, county and state elections. Some hold elective and appointive offices. All services provided by the state and local governments are equally available to Indians and non-Indians, including welfare benefits from the State of Montana, aid to dependent children, social and rehabilitation services, sanitary and solid waste facilities and public water systems. (App. p. 13) Access to the courts of the State of Montana is available to tribal members. (Plaintiffs' Response to Request for Admission of Facts, No. 22, September 13, 1974)

The only schools on the Reservation are those operated by school districts of the State of Montana. (App. pp. 12-13) Indian and non-Indian children attend school at various free public schools throughout the Reservation. Approximately

27 per cent of all students in attendance at public schools are members of the Tribes. In some school districts tribal members account for a majority of the total student body. Approximately 91 per cent of the support for the schools is generated by state and local tax revenues. (Affidavit, Harold W. Hehmer, August 23, 1974)

The state and local governments have built and maintained a system of state highways, county roads and streets on the Reservation which are used by Indians and non-Indians without restriction. (App. p. 14)

The Montana cigarette tax is 12 cents on each package sold within the state. 4.5 cents of the tax is allocated by state law to the state's general fund. The general fund is used for the support of state government, including the state institutions and the state educational systems, all of which provide service to Indians and non-Indians alike. Portions of cigarette tax revenues have been used by the State of Montana to pay veterans' bonuses. Eligible tribal members have received such bonuses. The cigarette tax loss to the State of Montana resulting from the sale of cigarettes on the Flathead Reservation for the years 1972, 1973 and the first half of 1974 exceeded the sum of $591,000.00. (App. pp. 13-14)

Land held by the United States in trust for the Tribes was leased with tribal council approval by individual tribal members for the erection of "smoke shops." The council approved the purchase of cigarettes for resale by the tribal members and charged an administrative fee for the service. (App. p. 14) The individual members who established the smoke shops did not have a State of Montana licenses to sell cigarettes and the cigarettes which were sold did not have state tax stamps affixed. (App. p. 40) The Tribes and the individual Plaintiffs instituted the cigarette tax case after arrest of the operators by county officials for failure to have a cigarette dealers' license and for failure to have Montana cigarette tax stamps affixed to each package of cigarettes sold.

Personal property, including motor vehicles and mobile homes, owned by tribal members generated tax revenues to the State of Montana and its political subdivisions during the fiscal year ending June 30, 1974, of $111,159.01. Of this total sum $100,478.69 was expended by the counties, school districts, cities, towns and special taxing districts to carry out governmental purposes on the local level.

Under Montana law, motor vehicles are required to be registered before being permitted on the public streets and highways of the state. R.C.M. 1947, Sec. 53-119. An owner of the vehicle is required to pay personal property taxes on the vehicle as a condition precedent to registration of the vehicle and receipt of license plates. R.C.M. 147, Sec. 53-114(3). The personal property tax case was instituted by the Plaintiff Tribes and individual tribal members owning motor vehicles to enjoin the collection of personal property taxes.

SUMMARY OF ARGUMENT

1. Indian citizens on the Flathead Reservation are members of an integrated society participating fully in the activities of the state and enjoying all benefits of state citizenship. If the State of Montana is forced to afford to such Indian citizens a special exemption from state taxation a condition of forced invidious discrimination founded upon considerations of race will result. Such invidious discrimination, mandated by the United States, is contrary to fundamental concepts of equal protection and due process embodied in the Fifth Amendment and cannot stand.

2. The Flathead Reservation was open for settlement under the terms of the General Allotment Act. 25 U.S.C. § 349, 24 Stat. 390. The General Allotment Act specifically made Indians on the Flathead Reservation receiving patents to lands "subject to the laws***of the state [of Montana]".

Such laws included the tax laws of the state. Exemption from state taxation is not to be granted by implication. In the absence of an express exemption contrary to the plain language of the General Allotment Act neither the Confederated Tribes nor individual Indians may claim exemption from state taxation.

3. 28 U.S.C. § 1341 specifically prohibits district court jurisdiction to enjoin collection of state taxes. The district court erred in concluding the Confederated tribes were entitled to an exemption from the statutory prohibition as a "federal instrumentality", and that the individual Indian plaintiffs were entitled to assert jurisdiction of the district court under the Civil Rights Act, 28 U.S.C. § 1343. The federal instrumentality concept no longer survives as an exception to 28 U.S.C. § 1341 available to Indian tribes. The plain language prohibition against jurisdiction in § 1341 precludes jurisdiction under 28 U.S.C. § 1343.

4. The State of Montana may exert its jurisdiction within the Flathead Reservation except where state jurisdiction conflicts with federal law. No such conflict is presented here. No question of regulation of federally licensed Indian traders is raised. The voluntary commercial transaction of sales of cigarettes by individual Indians to non-Indian purchasers in no way interferes with or involves tribal self-government or any other federally protected interest.

ARGUMENT

1.

The immunity from state taxation granted to Indians on the Flathead Reservation is an unlawful and unconstitutional racial discrimination in favor of Indians and against non-Indian citizens contrary to the fundamental principles of equal protection and due process embodied in the Fifth and Fourteenth Amendments to the Constitution of the United States.

This issue presents four square to this Court as a matter of first impression the question of how fundamental principles of due process and equal protection are interwoven into the complex fabric of the interrelationships among the state, Indian tribes within the borders of the state, tribal member Indian citizens, non-tribal member Indian citizens and non-Indian citizens. These fundamental due process and equal protection principles require reversal of the three-judge court.

The judgments of the district court create a special exemption from state taxation for certain individual citizens of the State of Montana solely because those citizens are Indians. This differentiation between Indian and non-Indian is racial in its foundations. See *United States v. Rogers*, 45 U.S. (4 How.) 567 (1846), *Loving v. Virginia*, 388 U.S. 1 (1967), *Kills Crow v. United States*, 451 F.2d 323 (8th Cir. 1971) cert. den. 405 U.S. 999 (1972) and 25 U.S.C. §§ 181, 182 and 184. In *United States v. Rogers, supra*, the racial distinction between Indian and non-Indian was discussed in the following language:

> **"Yet he [a white man adopted as a member of an Indian tribe] is not an Indian; and the exception is confined to those who by the usages and customs of the Indians are regarded as belonging to their race. It does not speak of members of a tribe, but of the race generally, — of the family of Indians; and it intended to leave them both, as regarded their own tribe, and other tribes also, to be governed by Indian usages and customs." (material in brackets added) (45 U.S. 4 How. at 573)**

The Treaty of Hell Gate does not of itself afford a basis for treatment of Indian citizens of the State of Montana differently from non-Indian citizens. At the time that treaty was negotiated in 1855 Indians were not generally considered to be citizens. Any justifiable basis for the generalization that Indians were not citizens ended with the ratification of the Fourteenth Amendment of 1868. Any remaining doubts as to United States and state citizenship of

Indians passed out of existence with enactment of the Act of June 2, 1924 (43 Stat. 253). See also *Boyd v. Nebraska*, 143 U.S. 135 (1892).

Indians are citizens of the United States and the State of Montana have and are entitled to all of the rights of citizenship including the right to vote accorded under Amendment 15 to the Constitution of the United States. In the instant case the facts demonstrate an unfettered exercise of all rights of citizenship by tribal members on the Flathead Reservation as members of an amalgamated and integrated society. They do not live in isolation on the Reservation apart from white or other ethnic groups. They can and do come and go freely from the Reservation to other parts of the State of Montana using, in part at least, motor vehicles which by the judgment below are exempt from state taxation.

The power of Congress under Art. I, Sec. 8, Cl. 3 of the United States Constitution to regulate commerce within Indian tribes is not without limitation and affords no justifiable basis for perpetuation of distinctions between citizens of the state which are in reality ethnic and racial in character. Inquiry into the reaches of congressional power to deal with Indian tribes discloses "that power is subject to constitutional limitations." *United States v. Klamath and Moadoc Tribes*, 304 U.S. 119, 123 (1938). Constitutional principles apply to all congressional action involving Indian tribes and to all phases of the United States dealings with Indians. Cf. *Kills Crow v. United States, supra.*

This Court has long adhered to the view that classifications based on race are contrary to our traditions and are constitutionally suspect. *Bolling v. Sharpe*, 347 U.S. 497 (1954), *Loving v. Virginia, supra*, and cases there cited at 388 U.S. 11 and *Frontiero v. Richardson*, 411 U.S. 677 (1973). Such classifications when created by the United States, as distinct from those created by the states, are no less suspect. *Bolling v. Sharpe, supra.*

While the Fourteenth Amendment does not per se apply to the federal government, its concept of equal protection

applies to the United States through the due process clause of the Fifth Amendment. *Bolling v. Sharpe, supra*, and *Bulluck v. Washington*, 468 F.2d 1096 (D.C. Cir. 1972). The requirement of equal protection has been applied frequently in tax classification cases. *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522 (1959) and *Walters v. City of St. Louis*, 347 U.S. 231 (1954).

The State of Montana obviously could not, consistent with Fourteenth Amendment concepts of equal protection, enact legislation which would discriminate as a class against Blacks or Mexican Americans. *Loving v. Virginia, supra.* Nor could Congress enact legislation directing the State of Montana to exempt all Blacks or Mexican Americans from state taxation without violating the equal protection concept embraced in the Fifth Amendment. *Bolling v. Sharpe, supra*, and *Frontiero v. Richardson, supra.*

If the State of Montana cannot, within the framework of equal protection, assume to tax on the basis of a distinction that is arbitrary and capricious it cannot be forced by the United States, in the exercise of its plenary but constitutionally limited power over Indian tribes to create a tax class solely based upon the arbitrary classification of some persons as Indians. Yet that is exactly what the decision of the district court has obliged the State of Montana to do. It must participate in a program of invidious discrimination by treating its non-Indian citizens differently from its Indian citizens. Judge Smith's dissent in *Moe* aptly summarizes the position in which the State of Montana is placed:

> "If, as I view it, the Flathead Indian is entitled to a full measure of Montana state and local government services, then I think the federal government may not, without invading the constitutional rights of non-Indian taxpayers, exempt Indians from the burdens of state taxation except to the extent that the people of the state accepted the congressional exemption stated in the Enabling Act. Stated differently, Congress has the

power to require that Indians be not deprived of the equal protection of state laws, and it has the power to exempt the Indian from state taxation, but in my opinion the exercise of both of these powers at the same time would deprive non-Indians of equal protection." (392 F.Supp. at 1321; App. pp. 28-29)

As noted in *Oklahoma Tax Comm'n v. United States,* 319 U.S. 598, 610 (1943) equality of privilege and equality of obligation are "inseparable associates". That balance of equality is destroyed by the decision of district court. It can only be restored by abolition of the exemption from state taxation for Indian citizens.

The invidious discrimination problem was presented, but not decided, in a different factual context in *DeFunias v. Odegaard,* 416 U.S. 312 (1974). The issue here, however, is not moot and will not pass with time. It can only intensify unless resolved by this Court.

No individual citizen or group of citizens has the right under the Constitution to demand action by the state which results in the denial of equal protection of the law to other citizens. *Shelley v. Kraemer, 344 U.S. 1 (1948)* and *Barrows v. Jackson,* 346 U.S. 249 (1952). Yet that is the result when the State of Montana is obliged to provide all state services to its Indian citizens and to extend to its Indian citizens all benefits of citizenship while imposing upon its non-Indian citizens the additional burden of taxation to supply services to Indians. Equality of privilege and of obligation are not maintained.

The pronouncements of this Court in *McClanahan v. State Tax Comm'n of Arizona,* 411 U.S. 164 (1973) are not in conflict with the position of the State of Montana asserted here. In *McClanahan* the Court dealt with the narrow question of "whether the State may tax a reservation Indian for income earned exclusively on the reservation". (411 U.S. at 168) In so doing the unique status of the Navahos who lived apart on a reservation over which the state generally lacked jurisdiction and to whom state services generally were not extended was recognized. *Warren Trading Post Co.*

v. Arizona Tax Comm'n, 380 U.S. 685 (1965). The whole of the history of the Flathead Reservation as well as the present status of Indians living on the Flathead Reservation is different. See Judge Smith's discussion of this point at 392 F.Supp. 1323-24, App. 32-34. No analogy between *McClanahan* and the cases at bar can be drawn.

The exemption recognized *Mescalaro Apache Tribe v. Jones,* 411 U.S. 145 (1973) extended only to the Tribe for property intimately connected with tax exempt real property. No such parallel exists between *Jones* and this appeal which is concerned with exemptions to individual Indian citizens.

The issue before the Court in *Martin v. Mancari,* 417 U.S. 535 (1974) likewise does not dictate a result contrary to the state's position here. That case involved solely the Indian in relationship to the federal government not in relationship to the state. The opinion is carefully limited to a problem of preferential employment in the Bureau of Indian Affairs — a problem related to Indian self-government.

Even if it be accepted that the historical treatment of Indians differently from non-Indians has a bearing on this appeal, we suggest that to perpetuate that distinction is to beg the real question. The rationale of treating Indians differently from non-Indians starting with *Worchester v. Georgia,* 31 U.S. (6 Pet.) 515 (1832) arose out of another age and another time. Indians like many other minority groups, were not then citizens and were not members of society in the usual sense. That situation no longer prevails. Enlightened constitutional concepts demand a boldly different approach which obliterates racial distinctions.

Since *Brown v. Board of Education,* 349 U.S. 294 (1954) this Court has repeatedly and consistently struck down and condemned laws which were founded on racial distinctions. See e.g. *Gloss v. Board of Education,* 373 U.S. 683 (1963), *Loving v. Virginia, supra,* and *DeFunis v. Odegaard, supra,* Douglas J., Dissenting. The position taken by the district court flies directly in the face of the policy enunciated by those cases. We respectfully suggest that the policy of *Brown* and its progeny should be applied to embrace the concept that the Constitution is legally color blind.

2.

The immunity from state taxation granted to Indians on the Flathead Reservation is contrary to the provisions of the General Allotment Act, 24 Stat. 390, 25 U.S.C. § 349, and related legislation.

The Act of April 23, 1904, 33 Stat. 302 opened the Flathead Reservation to allotment to individual Indians "under the provisions of the allotment laws of the United States" and to settlement by non-Indians under the general provisions of the homestead, mining and townsite laws of the United States. The allotment system and the General Allotment Act were specifically applied to the Flathead Reservation by the Act of April 23, 1904. *Confederated Tribes v. Namen,* 380 F.Supp. 349 (D. Mont. 1974).

Section 6 of the General Allotment Act provided in part:

> "At the expiration of the trust period, and when the lands have been conveyed to the Indians by patent in fee, as provided in Section 348 of this title, then each and *every allottee shall have the benefit of and be subject of the laws, both civil and criminal, of the state or territory in which they may reside;* and no territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law***" (emphasis added)

The plain meaning of this statute cannot be questioned. Only one interpretation is possible from the language of the act — upon expiration of the trust patent the Indian patentee was to become subject to the civil and criminal jurisdiction of the state.

The effect of receipt of a fee patent by an Indian patentee was discussed by this Count in *Dickson v. Luck Land Co.,* 242 U.S. 371, 375 (1917) as follows:

> "With those restrictions entirely removed and the fee simple patent issued, it would seem that the situation was one in which all questions pertaining to the disposal of land naturally would fall within the scope and operation of the laws of

> the State. And that Congress so intended is shown by the act of May 8, 1906, c. 2348, 34 Stat. 182 which provides that when an Indian allottee is given a patent in fee for his allotment he 'shall have the benefit of and be subject to all the laws both civil and criminal, of the State.' Among the laws to which the allottee became subject, and to the benefit of which he became entitled, under this enactment were those governing the transfer of real property, fixing the age of majority, and declaring the disability of minors."

In *Goudy v. Meath,* 203 U.S. 146 (1906) the Court considered a claim of exemption from state taxation by an Indian patentee who had received a fee patent under the General Allotment Act. Mr. Justice Brewer speaking for the Court answered the contention as follows:

> "But further, by the act of February 8, 1887, plaintiff became and is a citizen of the United States. The act, in addition to the grant of citizenship, provided that 'Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the state or territory in which they may reside.' Re Heff, 197 U.S. 488.
>
> Among the laws to which the plaintiff as a citizen became subject were those in respect to taxation. His property, unless exempt, became subject to taxation in the same manner as property belonging to other citizens, and the rule of exemption for him must be the same as for other citizens, — that is, no exemption exists by implication, but must be clearly manifested. No exemption is clearly shown by the legislation in respect to these Indian lands." (203 U.S. at 149)

The General Allotment Act has never been repealed although it has become inoperative since the advent of the Indian Reorganization Act of 1934, (48 Stat. 984). It nevertheless manifests an unmistakable congressional

intent that Indians receiving fee patents were, upon expiration of the trust period, to be subject to the laws of the state and otherwise considered as citizens of the state.[4]

All applicable treaties, legislative acts, general laws and executive orders applicable to the reservation must be considered in *pari materia* in determining congressional intent. *Stevens v. C.I.R.*, 452 F.2d 741, 744 (9th Cir. 1971), *Confederated Tribes v. Namen, supra,* at 380 F.Supp. 349. It is wholly unjustified to conclude that jurisdiction which was specifically conferred upon the state was withdrawn either by implication or by reference to decisions arising in wholly different factual contexts.

There is no language in the Indian Reorganization Act of 1934, 48 Stat. 984 which indicates an intent to modify the effect of the General Allotment Act as it applied to Indian fee patentees. Nor does *Mattz v. Arnett,* 412 U.S. 481 (1973) or *Seymour v. Superintendent,* 368 U.S. 351 (1962) dictate a different result. Nowhere in either of those decisions is there language from this Court which viciates the application of the General Allotment Act to Indian fee patentees.

The General Allotment Act protected the individual Indian allottee from exploitation during the period of restraint against alienation. However, once that restraint was removed he became subject to all rights and duties of citizenship. *Goudy v. Meath, supra.* If this Court holds, as did the majority of the three-judge district court, that not even those individual Indians receiving fee patents under the

[4]The language of 42 U.S.C. § 1981 is in accord. This statute provides:

> "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

General Allotment Act are subject to jurisdiction of the state it must conclude that Congress did not mean what is said regarding the patentee's place as a citizen of the state. Such a result clearly would require an improper rewriting of the statute contrary to congressional intent. Cf. *Choctau Nation v. United States,* 318 U.S. 423 (1943).

On the other hand if this Court were to conclude that only those Indians receiving fee patents were subject to jurisdiction of the state and all others were not, the net effect would be to reward those individual Indians not receiving such patents at the expense of the very persons that the language of the General Allotment Act was intended to protect and benefit — fee patentee tribal members.

We suggest neither of the above results is in step with the intent of Congress or an enlightened approach to the relationship of the United States to its Indian citizens. Both should be rejected.

Exemption of Indians from taxation is not to be granted by implication. *Oklahoma Tax Comm'n v. United States, supra,* and *Mescalaro Apache Tribe v. Jones, supra.* In *Oklahoma Tax Comm'n v. United States,* this Court validated an Oklahoma tax program arising out of a factual setting not unlike that present on the Flathead Reservation. Mr. Justice Black's comments are particularly apropros to the case at bar:

> "Congress has passed laws under which Indians have become full fledged citizens of the State of Oklahoma. Oklahoma supplies for them and their children schools, roads, courts, police protection and all the other benefits of an ordered society. Citizens of Oklahoma must pay for these benefits. If some pay less, others must pay more. Since Oklahoma has become a state, it has been authoritatively stated that tax losses resulting from tax immunity of Indians have totaled more than $125,000,000, a sum only slightly less than the bonded indebtedness of the state. If Congress intended to relieve these Indians from the burden of a state inheritance tax as a consequence of our

national policy toward Indians, there is still no reason why we should imply that it intended the burden to be borne so heavily by one state. But there is a complete absence of any evidence of congressional belief that these exemptions are required on equitable grounds, no matter on which sovereign the burden falls. Here is a tax based solely on ability to pay. 'Only the same duties are exacted as from our own citizens. The burden must rest somewhere. Revenue is indispensable to meet the public necessities. It is unreasonable that this small portion of it shall rest upon these Indians?' The Cherokee Tobacco, supra, 11 Wall. page 621, 20 L.Ed. 227. Recognizing that equality of privilege and equality of obligation should be inseparable associates, we have recently swept away many of the means of tax favoritism. Graves v. New York ex rel. O'Keefe, 306 U.S. 466, permitted States to impose income taxes upon government employees and Helvering v. Gerhardt, 304 U.S. 405, permitted the federal government to impose taxes on State employees. O'Malley v. Woodrough, 307 U.S. 277, overruled a previous decision which held that judges should not pay taxes just as other citizens, and Helvering v. Mountain Producers Oil Corp., supra, repudiated former decisions seriously limiting state and federal power to tax. See, also, Metcalf & Eddy v. Mitchell, 269 U.S. 514, and James v. Dravo Contracting Co., 302 U.S. 134. The trend of these cases should not now be reversed."

No specific exemption is available to the Confederated Tribes or to individual Indians on the Flathead Reservation. No exemption by implication should be permitted.

3.

The District Court erred in holding it had jurisdiction to enjoin enforcement of tax laws of the State of Montana notwithstanding the prohibition against such injunction in 28 U.S.C § 1341.

28 U.S.C. § 1341 contains a specific prohibition against the exercise of federal district court jurisdiction to enjoin the collection of taxes imposed under state law. Notwithstanding this prohibition the three-judge court concluded it had jurisdiction over both the claims of the Confederated Tribes and of the individual Indian members.[5]

Jurisdiction to entertain the Confederated Tribes' claim was premised on a determination by the three-judge court that the Tribes were within the federal instrumentality exception to 28 U.S.C. § 1341. Jurisdiction over the individual tribal members' claims was based on the Civil Rights Act, 28 U.S.C. § 1343 and 42 U.S.C. § 1983. The court erred in both conclusions.

As noted by the three-judge court this Court and the lower federal courts have carved an exception to the jurisdictional prohibition of 28 U.S.C. § 1341 to permit suit in the federal district courts in those instances where the particular interests of the United States are involved. *Department of Employment v. United States,* 385 U.S. 355 (1966), *United*

[5]In reaching this conclusion the three-judge court assumed the state court remedy to be adequate (App. p. 77). State law remedies were nevertheless "plain, speedy and adequate". An aggrieved taxpayer has the right to secure independent review of his taxation under Article VIII, Sec. 7 of the 1972 Montana Constitution. The review procedure is detailed by R.C.M. 1947, Sec. 84-601 to -607, -708, -709, and -709.1. Montana law also provides a specific remedy when, as in the case below, a party alleges the illegality of a state tax. R.C.M. 1947, Sec. 84-4502. Additionally, R.C.M. 1947, Sec. 84-4505 permits injunctive relief against the collection of a tax where the tax or part thereof sought to be enjoined is illegal or the property is exempt from taxation. Similar procedures have been held to affort adequate relief to complaining taxpayers. *Bussie v. Long,* 383 F.2d 766 (5th Cir. 1967); and *Non-Resident Taxpayers Ass'n v. Municipality of Philadelphia,* 478 F.2d 456 (3rd Cir. 1973).

States v. Arlington County, Commonwealth of Virginia, 326 F.2d 929 (4th Cir. 1964), *Agua Caliente Band of Mission Ind. v. County of Riverside*, 442 F.2d 1184, 1186 (9th Cir. 1971) cert. denied, 405 U.S. 933 (1972). Having noted this exception the three-judge court went on to conclude that the United States had a "real and significant interest" in the Confederated Tribes and that they were embraced by the federal instrumentality doctrine. (392 F.Supp. at 1303; App. p. 43-44)

The district court's expansion of the federal instrumentality concept to embrace an entity in which the United States had a "real and significant interest" is unwarranted and contrary to the pronouncements of this Court in *McClanahan v. State Tax Comm'n of Arizona, supra,* and *Mescalero Apache Tribe v. Jones, supra. McClanahan* and *Jones* declared that an Indian tribe was not a federal instrumentality exempt from state taxation. In *Jones,* Mr. Justice White speaking for the Court noted:

> "The intergovernmental-immunity doctrine was once much in vogue in a variety of contexts, and with respect to Indian affairs, was consistently held to bar a state tax on the lessees of, or the product or income from, restricted lands of tribes or individual Indians. The theory was that a federal instrumentality was involved and that the tax would interfere with the Government's realizing the maximum return for its wards. This approach did not survive; its rise and decline in Indian affairs is described and reflected in Helvering v. Mountain Producers Corp., 303 U.S. 376, (1938); Oklahoma Tax Comm'n v. United States, 319 U.S. 598, (1943); and Oklahoma Tax Comm'n v. Texas Co., 336 U.S. 342 (1949), where the Court cut to the bone the proposition that restricted Indian lands and the proceeds from them — were as a matter of constitutional law — automatically exempt from state taxation.

***

> The Indian Reorganization Act of 1934 neither requires nor counsels us to recognize this tribal business venture as a federal instrumentality. Congress itself felt it necessary to address the immunity question and to provide tax immunity to the extent it deemed desirable. There is, therefore, no statutory invitation to consider projects undertaken pursuant to the Act as federal instrumentalities generally and automatically immune from state taxation." (411 U.S. at 150-151)

The activities of the Confederated Tribes involved in the cases at bar — leases of real property for private commercial venture and ownership of personal property, particularly motor vehicles used on and off the reservation — are less protected than those found in *Jones* to be insufficient to involve the federal instrumentality doctrine. The activities of the Tribes upon which the claim of exemption is founded are, as in *Jones,* proprietary rather than governmental in nature. Such proprietary undertakings do not bring into play the federal instrumentality exception. Cf. *Federal Compress & Warehouse Co. v. McLean,* 291 U.S. 17 (1934).

The stated grounds for upholding jurisdiction on behalf of the individual Indian plaintiffs was 42 U.S.C. § 1983 and its jurisdictional counterpart 28 U.S.C. § 1343 providing for jurisdiction in district courts to "redress the deprivation***of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens". The three-judge court resolved the conflict between the language of 28 U.S.C. § 1343 which seemingly grants jurisdiction and the absolute prohibition against jurisdiction in 28 U.S.C. § 1341 in favor of the claimants.

A contrary result was reached by the Second and Fifth Circuits in *American Commuters Association, Inc. v. Levitt,* 405 F.2d 1148 (2nd Cir. 1969) and *Bland v. McHann,* 463 F.2d 21 (5th Cir. 1972). The Fifth Circuit in *Bland v.*

McHann faced the issue squarely and concluded that 28 U.S.C. § 1343 and 42 U.S.C. § 1983 did not carve an exception to the prohibition against suit in § 1343. In reaching its decision the Court stated:

> "It is well established that § 1341 is an explicit congressional limitation on the jurisdiction of the federal courts which would enjoin, suspend or restrain state tax levy, assessment or collection. Taxpayers seek to circumvent § 1341 by arguing that relief under § 1983 is supplemental and is not limited to any requirement of exhaustion of state remedies. We do not disagree with the general rule that exhaustion is not required in § 1983 cases; however, in this case § 1983 collides full force with a specific congressional limitation on federal jurisdiction. In such circumstances we are convinced that § 1341 must prevail.
>
> The Second Circuit has squarely confronted and resolved this clash. In American Commuters Ass'n v. Levitt, the court totally rejected the claim that § 1983 somehow provided an exception to the clear limitations of § 1341: [C]onsidering the special attention courts have always shown to tax matters even when constitutional rights are involved..., plus the unequivocal congressional statement set forth in § 1341, we conclude that when there are adequate state remedies available, § 1341 means what it so plainly says and that federal jurisdiction is still precluded by it." (footnotes omitted) (463 F.2d at 24)

In *Bland* the complaining taxpayers were Negroes charging that increases in property tax assessments "were solely the result of racial discrimination and were in retaliation for prior demonstrations". (463 F.2d at 23) Here the individual plaintiffs are Indians. To allow an exception for one ethnic minority, Indians, and to deny a similar exception to another minority, Blacks, is, we suggest, a distinction repugnant to our system. The express statutory

prohibition of 28 U.S.C. § 1341 should be held to bar the claim of the individual Indians as well as that of the Confederated Tribes.

4.

The State of Montana has jurisdiction over individual Indian citizens who are members of the Confederated Salish and Kootenai Tribes residing on the Flathead Reservation to require precollection of state cigarette taxes on sales of cigarettes to non-Indians.

The arguments presented in support of the state's appeal require affirmation of the three-judge court's ruling that the State of Montana may require precollection of state taxes on sales of cigarettes made to non-Indian purchasers. Independent grounds further support the decision of the district court.

The taxes imposed by Montana under R.C.M. 1947 Sec. 84-5606(1) are "conclusively presumed to be direct taxes on the retail customer precollected for the purpose of convenience and facility only". It is not the Indian retailer who pays the tax but the non-Indian consumer. In the instant case the record establishes that the Indian retailer obtained cigarettes from the wholesaler and sold them without state tax stamps affixed. Thus, there was not in fact a prepayment requirement by the retailer in order to obtain inventory for resale.

The individual Indian retailers are not licensed Indian traders comparable to those in *Warren Trading Post v. Arizona Tax Comm'n supra*. The proprietors operated the retail outlets as private entrepreneurs rather than as federal licensees.

Sales to non-Indians are not required. The entire "smoke shop" venture was and remains a private commercial undertaking for individual profit. It is neither a tribal venture nor an enterprise for the benefit of the Confederated

Tribes as an entity. Tribal self-government intended for protection by *Williams v. Lee*, 358 U.S. 217 (1959) simply is not involved. Tribal self-government principles are not brought into play by sales of cigarettes to non-Indian purchasers.

Sales to non-Indians without collection of the tax invites violation of criminal law by the non-Indian purchaser (R.C.M. 1947, Sec. 84-5606.18, App. p. 222). Neither *McClanahan v. State Tax Comm'n of Arizona, supra*, nor any other decision of this Court suggests that such a result would find judicial acceptance.

CONCLUSION

It is respectfully submitted that (1) those portions of the judgment in the cigarette tax case enjoining the State of Montana from collecting certain cigarette excise taxes and cigarette dealer's license taxes on the Flathead Reservation, and (2) the judgment in the personal property tax case enjoining the State of Montana from collecting personal property taxes from tribal members residing on the Flathead Reservation should be reversed and the causes dismissed.

It is further submitted that the portion of the judgment in the cigarette tax case permitting the State of Montana to require tribal members who sell cigarettes on the Flathead Reservation to precollect state cigarette excise taxes on sales of cigarettes to non-Indian purchasers should be affirmed.

Respectfully submitted,

Robert L. Woodahl
Attorney General for the State of Montana
State Capitol Building
Helena, Montana 59601

Jean A. Turnage
Special Assistant Attorney General
P.O. Box 450
Polson, Montana 59860

Sam E. Haddon
Special Assistant Attorney General
First National Montana Bank Building
Missoula, Montana 59801

By Sam E. Haddon
Attorneys for Appellants

CERTIFICATE OF MAILING

I, SAM E. HADDON, one of the attorneys for the Appellants certify that on the 18th day of November, 1975, I served three copies of the foregoing BRIEF FOR THE APPELLANTS on each of the counsel for Appellants herein by mailing true copies thereof, first class postage prepaid as follows:

Victor F. Valgenti, Esq.
Attorney at Law
212 First Federal Building
Missoula, Montana 59801

and first class air mail postage prepaid as follows:

Richard A. Baenen, Esq.
Attorney at Law
1735 New York Avenue, N.W.
Washington, D.C. 20006

Sam E. Haddon